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IN THE
SUPREME COURT OF THE UNITED STATES

October Term 1977

No. 27-517

RICHARD J. DOLWIG,
Petitioner,
vs.
UNITED STATES OF AMERICA,
Respondent.

PETITION FOR WRIT OF CERTIORARI
TO THE UNITED STATES COURT OF APPEALS
FOR THE NINTH CIRCUIT

GODFREY ISAAC, ESQ. and
LAWRENCE JAY KRAINES, ESQ.

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vs.
UNITED STATES OF AMERICA,
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PETITION FOR WRIT OF CERTIORARI
TO THE UNITED STATES COURT OF APPEALS
FOR THE NINTH CIRCUIT

The Defendant-Petitioner, RICHARD J. DOLWIG, petitions for a Writ of Certiorari to review the judgment of The United States Court of Appeals for the Ninth Circuit in this case, entered on May 26, 1977.

OPINIONS BELOW

The opinion of the Court of Appeals is reported at 554 F.2d 958 and is printed in Appendix A hereto.

JURISDICTION

The judgment of the Court of Appeals (554 F.2d 958 (1977)), printed in Appendix A hereto, was entered on May 26, 1977, and was amended on September 6, 1977. Petition for rehearing was timely filed and was denied on September 6, 1977. Jurisdiction of this Court is invoked under 28 U.S.C. § 1254(1). Petitioner's Opening and Reply Briefs before the Ninth Circuit Court of Appeals are referred to numerous times in this petition. Therefore, copies of said Opening Brief and Reply Brief have been lodged with this Court for the Court's consideration in ruling on this petition.

QUESTIONS PRESENTED

1. Whether the special attorneys who appeared before the federal grand jury in this case had any authority whatsoever or

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whether they had proper authority under Title 28, U.S.C. § 515 to appear before said grand jury and, if they did not, whether the indictment thereafter returned was tainted and void requiring the reversal of the convictions obtained thereunder?

2. Whether, under the ruling in Schaffer v. United States (1960), 362 U.S. 511, the Court of Appeals should have reversed the convictions of Petitioner due to the failure of the trial court to grant Petitioner a separate trial?

3. Whether the Court of Appeals should have reversed the convictions of Petitioner due to the prejudice and lack of impartiality of the trial judge?

4. Whether, under the ruling in Remmer v. United States (1954), 347 U.S. 227, the Court of Appeals should have reversed the convictions of Petitioner due to the interference by the Court Clerk with members of the jury during its deliberations?

5. Whether the Court of Appeals should have reversed the convictions of Petitioner due to the following:

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- (A) Prosecutorial misconduct during opening and closing arguments;
- (B) Insufficiency of the evidence;
- (C) Co-counsel's references to Mafia connections;
- (D) Failure to instruct the jury as requested by Petitioner and instruction of the jury over his objections;
- (E) Varying the Order of Proof as to conspiracy;
- (F) Refusal to dismiss entire jury panel due to pretrial prejudice and bias;
- (G) Failure to comply with the mandate of Brady v. Maryland (1963), 373 U.S. 83, requiring that exculpatory evidence be timely presented to a defendant accused of crime; and
- (H) The Ninth Circuit Court of Appeals either ignored an uncontested part of the evidence or misunderstood its significance.

4.

CONSTITUTIONAL PROVISIONS AND STATUTES INVOLVED

The constitutional provisions involved are the due process clause of the Fifth Amendment to the United States Constitution and the Sixth Amendment to the United States Constitution. The federal statutes involved are 28 U.S.C. §§ 515 and Federal Rules of Civil Procedure 6(d) and 54(c) which are printed in Appendix B hereto.

STATEMENT OF CASE

Beginning on January 23, 1975, U.S. Special Attorneys, ROBERT J. BREAKSTONE and EDMUND D. LYONS, appeared before the Grand Jury for the Northern District of California, and presented evidence or assisted in the presentation of evidence which resulted in the return of an indictment on June 5, 1975. The purported "Letter of Authority" (there is hereinafter a discussion of the defects and questions of authenticity relating thereto) and the Oath of Special Attorney ROBERT J. BREAKSTONE, were dated June 11, 1974. The "Letter of Authority" of the other Special Attorney,

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EDMUND D. LYONS, was dated February 4, 1975, and the Oath was filed on February 19, 1975, weeks after said attorney had apparently already appeared before the federal grand jury in this case.

The indictment charged David Kaplan, David Gorwitz, Earl Vogt, Walter Stradley, Gerald Enis, Douglas Cassidy and Richard Dolwig with violation of various Federal laws. In addition, Paul Axelrod and Hugh DuVal were named as unindicted co-conspirators. The indictment consisted of some twenty-eight (28) counts. All defendants were not charged with all counts.

The indictment charged that the defendants did devise and intend to devise a scheme and artifice to defraud and to obtain money and property, by means of false and fraudulent pretenses, representations and promises from certain named persons throughout the United States.

Defendant RICHARD DOLWIG, a former State legislator who honorably served 10 years in the California State Assembly and 14 years in the California State Senate,

was charged in a total of ten (10) counts (Counts 19-28):

In Counts 19 through 22, all defendants were charged with unlawfully using the United States mails on four occasions to carry out a fraudulent scheme in violation of Title 18, United States Code, §§ 1341 and 1342.

In Counts 23 through 25, all defendants were charged with unlawfully inducing persons to travel in interstate commerce on three occasions in order to execute a scheme to defraud such persons of money and property having a value in excess of \$5,000.00 in violation of Title 18, United States Code, §§ 2314 and 2.

In Count 26, all defendants were charged with transporting securities and monies in a value in excess of \$5,000.00, in interstate commerce which had been taken by fraud in violation of Title 18, United States Code, §§ 2314 and 2.

In Count 27, all defendants were charged with joining together in a group employed by and associated with Eurovest, Ltd., and conducting racketeering

activities by perpetrating the acts charged in Counts 1 through 26, in violation of Title 18, United States Code, §§ 1962(c), 1961(1)(3) and (2).

In Count 28, all defendants were charged with conspiracy in that they knowingly used wire and other communications in interstate commerce; knowingly used the United States mails; knowingly induced persons to travel in interstate commerce; and knowingly transported securities and monies in excess of \$5,000.00 in interstate commerce--all in furtherance of a scheme to defraud certain persons.

Petitioner, RICHARD J. DOLWIG, entered his plea of not guilty as to each count with which he was charged. Trial was had before a jury in the Federal District Court for the Northern District of California, at San Francisco, California. Petitioner was convicted on eight of the ten counts with which he was charged, Counts 21 through 28, and was acquitted as to Counts 19 and 20. He was sentenced to imprisonment for various terms: Two (2) years as to Count 21; Two (2) years as to Count 22;

Five (5) years as to Count 23; Five (5) years as to Count 24; Five (5) years as to Count 25; Five (5) years as to Count 26; Five (5) years as to Count 27; and Four (4) years as to Count 28. All sentences were to run concurrently.

Petitioner, RICHARD J. DOLWIG, timely filed a Notice of Appeal in The United States Court of Appeals for the Ninth Circuit on October 10, 1975. He is presently free on \$10,000.00 bail. The Court of Appeals affirmed the convictions of all defendants except as to Count 22 which it reversed, in a per curiam opinion by Judges Goodwin, Sneed and Fitzgerald, on May 26, 1977, which is printed in Appendix A hereto (554 F.2d 958). Thereafter, Petitioner filed a Petition for Rehearing which was denied by the Court of Appeals on September 6, 1977.

REASONS FOR GRANTING THE WRIT

1. **CERTIORARI SHOULD BE GRANTED TO REVIEW THE AUTHORITY OF THE TWO SPECIAL ATTORNEYS OF THE UNITED STATES DEPARTMENT OF JUSTICE WHO REPRESENTED THE GOVERNMENT, WHO OBTAINED A FEDERAL INDICTMENT AND WHO PROSECUTED THIS CASE.**

The duties of the United States Attorney are contained in 28 U.S.C. 547, which vests in the U.S. Attorneys exclusive authority to prosecute all criminal offenses in the United States.

As defined by Federal Rule of Criminal Procedure, Rule 6(d) (printed in Appendix B), only attorneys for the government may be present while the Grand Jury is in session. Rule 54(c) (printed in Appendix B) states that an "attorney for the government" means the Attorney General, an authorized assistant of the Attorney General, a U.S. Attorney and an authorized assistant of a U.S. Attorney.

Title 28, U.S.C. § 515 (which is printed in Appendix B), specifies the prerequisites which must be met in order for an attorney to be specially appointed by

the Attorney General as a Special Attorney and thereby be authorized to bring legal proceedings on behalf of the federal government. These include a special appointment and the taking of an oath.

Petitioner's objection to the authority of the Special Attorneys to obtain the indictment and prosecute this case is two fold:

(A) THE FIRST OBJECTION CHALLENGES THE AUTHORITY OF THE SPECIAL ATTORNEYS ON THE BASIS THAT NO LETTER OF AUTHORIZATION ACTUALLY EXISTED.

Two Special Attorneys represented the government in this case: ROBERT J BREAKSTONE and EDMUND D. LYONS. Both men were present during the Grand Jury proceedings beginning on January 23, 1975, and both men presented the government's case at the trial.

On July 15, 1977, after first learning that a question existed as to the authority of the Special Attorneys in this case, Petitioner filed a Motion for Bill of Particulars or for Evidentiary Hearing to

specifically determine the authority of such attorneys. Although the Court denied the motion, the opposition papers filed by the government revealed very important facts regarding the authority of the Special Attorneys in this case.

As to Special Attorney, ROBERT J. BREAKSTONE: Mr. Breakstone's illegible "Letter of Authority" (Appendix C hereto) is dated June 11, 1974, as is his Oath (Appendix D hereto), but his Letter is not only a form letter, but is not signed by its writer, who purportedly is HENRY E. PETERSEN, Assistant Attorney General. In addition, it is not on any official letterhead but is on a plain piece of paper.

Although it is true that the cases interpreting § 515 expressly hold that the Attorney General may authorize an assistant to appoint Special Attorneys, it is clear that he who purports to appoint such an attorney must actually do so and form letters prepared by some unknown person and never seen or signed by the purported "appointer" cannot be valid.

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In this case, the "Letter of Authority" offered by Special Attorney BREAKSTONE to substantiate his authority lacks the signature of anyone. In fact, the end of this letter does not even bear the initials of the dictator of the letter or the secretary who typed same. In addition the letter is not on any letterhead.

Since it is not clear whether or not Assistant Attorney General, HENRY E. PETERSEN, authorized the appointment of Special Attorney BREAKSTONE, the Court of Appeals should have granted Petitioner's Motion for Bill of Particulars or should have granted an evidentiary hearing to determine the true facts.

As to Special Attorney, EDMUND D. LYONS: The same documents offered in opposition to Petitioner's Motion for Bill of Particulars show that Special Attorney LYONS did not receive his "Letter of Authority" (Appendix E hereto) until February 4, 1975, and filed his Oath (Appendix F hereto) on February 19, 1975.

The facts also indicate that Special Attorney LYONS appeared at and participated

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in the Grand Jury proceedings in this case which began on January 23, 1975, several weeks before he had complied with the statutory prerequisites of § 515.

Although the government claims that only Special Attorney BREAKSTONE presented evidence to the Grand Jury, it is not claimed that Special Attorney LYONS was not present at those proceedings - thus rendering him a participant therein and requiring full authority.

The federal rule pertaining to the limitation on the presence of unauthorized persons in the Grand Jury room during its proceedings is well-founded in our tradition. Such rule is to protect not only the system, but the accused himself.

It has been held that the appearance and participation of a special assistant attorney not properly appointed or specifically directed by the Attorney General within § 515 is ground for setting aside an indictment.

In United States v. Williams (1974), 65 F.R.D. 422, the Court dismissed an

indictment obtained by two special attorneys. The case cites 4 A.L.R.2d 392 on the subject of "Presence in Grand Jury Room of Person Other Than Grand Juror as affecting Indictment," which collects the various cases on the subject and summarizes the federal rule that "the appearance and participation of a special assistant not properly appointed or specifically directed by the Attorney General within the meaning of the statute has been held grounds for setting aside an indictment." (at p. 445)

The Williams case further points out that this Court's opinion in United States v. Crosthwaite (1897), 168 U.S. 375, underscores the prime importance of giving § 515(a) a construction consistent with the Congressional intent expressed when the Act of June 30, 1906 was enacted. For the Congress, the case points out, had not passed any legislation broadening the authority of the Attorney General since it acted in 1906.

It is settled that the Attorney General has power to appoint attorneys under § 515 and only under that section.

Failure to comply with that section's prerequisites denies an appointed attorney the power to appear before a grand jury, obtain an indictment or prosecute a case.

Since the Special Attorneys in this case lacked adequate Letters of Authority pursuant to § 515, at the time of their appearance before the Federal Grand Jury in this case, the indictment they obtained was improperly obtained and the conviction of the Petitioner obtained by way of such tainted indictment cannot stand.

(B) THE SECOND OBJECTION ASSUMES, FOR THE SAKE OF ARGUMENT ONLY, THAT THE LETTERS OF AUTHORIZATION EXIST, BUT CHALLENGES THEIR VALIDITY UNDER § 515 OF TITLE 28 AND ITS "SPECIALLY DIRECTED" REQUIREMENT.

The cases in this area indicate that questions regarding the validity of the same Letters of Authority which exist in this case have been decided differently by different federal District Courts and federal Courts of Appeal. There are directly conflicting cases on point and, as yet, the questions presented have not

been resolved by this Court. In fact, Petitioner has been unable to find any decision of this Court dealing with the validity of the form letters presently used by the United States Attorney General. Due to the present conflict, as is more fully discussed, infra, important issues exist which can only be resolved by this Court.

Title 28 U.S.C. § 515, printed in Appendix B hereto, allows the Attorney General to appoint a special attorney by "specifically" directing him to conduct legal proceedings. In addition, the special attorney must take an oath.

The questions which arise in this case, and have arisen in many other cases in this area, is what is the meaning of the phrase "specifically directed" which appears in § 515(a) and does the form Letter of Authorization used by the Attorney General comport with the "specifically directed" requirement of that section?

Close inspection of § 515(a) reveals that there are two possible meanings which can be attributed to the requirement that

the special attorney be "specifically directed." One is that the language "specifically directed" only requires that the special attorney be directed to participate in a specified kind of proceeding. The other construction is that there must be a direction for a specific case in which the special attorney is to participate. (United States v. Martins, 288 F. 991 (D. Mass. 1923). Either construction is equally warranted by the language of the statute. The choice of constructions can be made only after an examination of the relation of § 515(a) to the statutes establishing the network of United States attorneys and a review of the history of § 515(a).

Title 28 U.S.C., Chapter 35, §§ 541-550, establishes a nationwide system of United States attorneys. Section 547 provides for the duties and powers of the United States attorneys and states:

"Except as otherwise provided by law, each United States attorney, within his district, shall--

"(1) prosecute for all offenses against the United States; * * *."

Viewing these statutory provisions together, it is apparent that the legislative scheme created by Congress is one in which the primary responsibility for the prosecution of offenses against the United States is placed in the hands of the United States attorney who is appointed from his district for a term of years and is only removable by the President. Although the United States attorneys are subject to the Attorney General, they are not his employees, and it is evident that Congress intended that the United States attorneys only be circumvented under special circumstances; it should be for something unusual and not as a standard operating procedure.

This legislative scheme is in the spirit of the federalism which is built into our laws which makes it difficult to concentrate power in the hands of those in Washington. The Attorney General's prosecutorial power is limited by the established system of United States attorneys,

and the Attorney General's expansion of that power is limited by § 515(a). It has been argued that § 515(a) gives the Attorney General the same power and authority as the United States attorney has. Congress never intended this. The decision to grant the primary power and responsibility for prosecution of all federal crimes to a single United States attorney in each district is one which cannot be viewed to be irrational in light of the constitutional decision to have a federal rather than a national government.

It also has been argued that the Act of 1906, now codified as 28 U.S.C. § 515(a), had the effect of allowing the Attorney General to supersede the local United States attorneys and their assistants by appointing special attorneys and endowing them with roving commissions to take the very actions which are statutorily entrusted to the United States attorneys. Attention must therefore be focused on the legislative history and subsequent judicial interpretations of § 515(a).

The Act of 1906, now codified as 28 U.S.C. § 515(a), was enacted in response to the decision in United States v. Rosenthal, 121 F. 862 (C.C.S.D.N.Y. 1903). There, Mr. W. Wickham Smith was commissioned a special assistant to the Attorney General to investigate and report concerning alleged fraudulent importations and to prepare and conduct such civil and criminal proceedings as may result therefrom. Smith pursued the investigation of the alleged offenses and chiefly conducted the grand jury proceedings. The defendants' motions to quash the resulting indictments on the ground that Smith was not legally authorized to conduct the grand jury proceedings were granted.

In Rosenthal, Judge Thomas first ruled that the statutory power of the Attorney General to conduct and argue any "case" in any court did not authorize him to make appearances before grand juries (121 F. at 866-867). Since Smith was not commissioned as an assistant to the District Attorney but only as a special assistant to the Attorney General, the conclusion that the Attorney General had no power to appear

before grand juries necessitated the conclusion that Smith also lacked such power.

In response to Rosenthal, Congress passed the Act of June 30, 1906, 34 Stat. 816, which is currently codified at 28 U.S.C. § 515(a). The Act enabled special attorneys to conduct legal proceedings, including grand jury proceedings, "when specifically directed by the Attorney General." Bills were introduced in both Houses of Congress, and the House bill was passed. The complete House report provided as follows:

"Mr. Gillett of California from the Committee on the Judiciary submitted the following:

"The Committee on the Judiciary, having had under consideration the bill (H.R. 17714) to authorize the commencement and conduct of legal proceedings under the direction of the Attorney-General, respectfully report the same back with the recommendation that the same do pass.

"The purpose of this bill is to give to the Attorney-General, or to any officer in his Department or to any attorney special- ly employed by him, the same rights, powers, and authority which district attorneys now have or may hereafter have in presenting and conducting proceedings before a grand jury or committing magistrate.

"It has been the practice of Attorney-General for many years to employ special counsel to assist district attorneys in the prosecution of suits pending in their respective districts whenever the public interest demanded it. It has been the practice of such special counsel to appear, with the district attorney, before grand judges and committing magistrates and to assist in the proceeding pending there. This right passed unchallenged for many years, until the Circuit Court for the Southern District

of New York, on March 17, 1903,
in the case of the United States
v. Rosenthal, decided that --

"The Attorney General,
the Solicitor General, nor
any officer of the Depart-
ment of Justice is author-
ized by sections 359, 367,
or other provision of the
Revised Statutes of the
United States [U.S.Comp.St.
1901, pp. 207, 209], to con-
duct, or to aid in the con-
duct of, proceedings before
a grand jury, nor has a spe-
cial assistant to the Attor-
ney General such power.'

"And the court further held that --

"A special assistant to the
Attorney General, appointed
to investigate and report
concerning alleged fraudulent
importations of Japanese
silks at the port of New York,
and to prepare and conduct
such civil and criminal pro-
ceedings as may result

therefrom, is not authorized
by law to conduct, or to aid
the conduct of, proceedings
before a federal grand jury,
and indictments based upon
such proceedings so conducted
should be quashed upon motion.'

"This decision makes the pro-
posed legislation necessary if the
Government is to have the benefit
of the knowledge and learning of
its Attorney-General and his
assistants, or of such special
counsel as the Attorney-General
may deem necessary to employ to
assist in the prosecution of a
special case, either civil or
criminal. As the law now stands,
only the district attorney has any
authority to appear before a grand
jury, no matter how important the
case may be to the interests of the
Government to have the assistance
of one who is specially or parti-
cularly qualified by reasons of
his peculiar knowledge and skill
to properly present to the grand

jury the question being considered by it.

"The Attorney-General states that it is necessary, in the due and proper administration of the law, that he shall be permitted to employ special counsel to assist the district attorney in cases which district attorneys or lawyers do not generally possess, and in cases of such usual [sic] importance to the Government, and that such counsel be permitted to possess all of the power and authority, in that particular case, granted to the district attorney, which, of course, includes his right to appear before a grand jury either with the district attorney or alone.

"It seems eminently proper that such powers and authority be given by law. It has been the practice to do so in the past and it will be necessary that the practice shall continue in the future.

"If such a law is necessary to enable the Government to properly prosecute those who are violating its laws, it is no argument against it that some grand jury may be, perhaps, unduly influenced by the demands or importunities that may be made upon it by such special counsel. The same argument can as well be made against permitting a district attorney from attending a sitting of such jury.

"There can be no doubt of the advisability of permitting the Attorney-General to employ special counsel in special cases, and there can be no question that if he has been employed because of his special fitness for such a special case that the Government should have the full advantage of his learning and skill in every step necessary to be taken before the trial, including that of appearing before grand juries.

"The law proposed by the bill under consideration seems to be very necessary, because of the decision in the Rosenthal case, hereinbefore referred to, and the committee recommend its speedy enactment." H.R. Rep. No. 2901, 59th Cong., 1st Sess. (1906).

(Emphasis added.)

As stated by Judge Werker in United States v. Crispino, 392 F.Supp. 764, 772 (S.D.N.Y., 1975):

"The House Report leaves no room for doubt that Congress intended the Attorney General to have the power to appoint special attorneys to prosecute a particularly important case or a special case or cases. This power was seen as a necessary aid to effective law enforcement. Rather than restricting the appearances of these attorneys to the trial of cases, it was deemed appropriate that they appear in every step of the litigation including grand jury proceedings. However, since

the district attorneys and their regular assistants had the responsibility for prosecuting all crimes in their districts, the appearance of special attorneys before grand juries was limited to special cases where the Attorney General concluded that the particular knowledge and skill of these special attorneys would be useful." (Emphasis added.)

Following the enactment of the Act of 1906, several courts were called upon to decide the meaning of the language "specifically directed" in the context of attorneys appointed under what is now § 515(a) appearing before grand juries. At least one case, United States v. Cohen, 273 F. 620 (D. Mass. 1921), dismissed an indictment where the appointment letter was too narrow to cover the actions--filing informations--which the special attorney had taken. Several other cases dealt with whether the appointment letters were sufficiently specific, i.e., whether the letters had to specify particular persons, statutes, or districts.

In the United States v. Goldman, 28 F.2d 424 (D. Conn. 1928), the Court ruled that an attorney appointed as a special assistant to the United States attorney for the district of Connecticut who acted as a stenographer before the grand jury was not lawfully present there because his commission letter did not specify any particular case or person.

Other cases have upheld indictments where the appointment letter specified several particular persons together with "others", and persons not named in the appointment letter were indicted.

Shushan v. United States, 117 F.2d 110 (5th Cir. 1941), cert. denied, 313 U.S. 574, 61 S.Ct. 1085, 85 L.Ed. 1531, re-hearing denied, 314 U.S. 706, 62 S.Ct. 53, 86 L.Ed. 564 (1941); United States v. Amazon Industrial Chemical Corp., 55 F.2d 254 (D. Md. 1931); United States v. Huston, 28 F.2d 451 (W.D. Ohio 1928); United States v. Morse, 292 F. 273 (S.D. N.Y. 1922). It must be noted, however, that in Shushan, the appointment letter specifically mentioned mail fraud cases,

and in Huston and Morse, the appointment letters specified certain federal statutes.

In United States v. Amazon Industrial Chemical Corp., supra, it was also held that the appointment letter did not have to specify particular statutes, although as noted above, the appointment letter there did name several particular persons who were to be investigated and prosecuted. Also, in United States v. Powell, 31 F. Supp. 288 (E.D. Mo. 1948), an indictment for violations of federal law in a primary election was upheld although the special attorney's appointment letter was limited to investigating irregularities in the general election. The appointment letter in Powell did specify certain federal statutes, one of which was the basis for the indictment there.

In United States v. Huston, 28 F.2d 451 (N.D. Ohio 1928), the Court dealt with whether the district in which the special attorney was to act had to be specified in the appointment letter. The special attorney there had been authorized to act in the

Western District of Missouri, the District of Minnesota, and "in any judicial district where the jurisdiction thereof lies." (28 F.2d at 454). The special attorney went to the Northern District of Ohio and began an investigation independent and unrelated to any investigation in Missouri or Minnesota. The Court concluded that the special attorney was not authorized to conduct grand jury proceedings in Ohio which were not "dependent or ancillary" to crimes in Missouri or Minnesota (28 F.2d at 456).

United States v. Hall, 145 F.2d 781 (9th Cir. 1944), cert. denied, 324 U.S. 871, 65 S.Ct. 1016, 89 L.Ed. 1425 (1945), involved the establishment of a Lands Division office in Los Angeles by the Justice Department which was staffed by special attorneys who were directed to conduct such Lands Division cases as were assigned to the office. The United States attorney had agreed to the transfer of specialized condemnation work to the Lands Division office and was no longer signing pleadings in condemnation cases. After

the district court held it had no jurisdiction where the United States attorney did not "'initiate and prosecute' condemnation proceedings on behalf of the Government", United States v. 1,960 Acres of Land in Riverside County, Cal., 54 F. Supp. 867, 882 (S.D. Cal. 1944), the Government petitioned the Ninth Circuit for a writ of mandamus. The Court stated that the Act of 1906, now codified as § 515(a) --

"* * * authorizes the Attorney General to institute litigation, to enter into pending litigation, and to cooperate with the district attorney or to proceed to handle such litigation independent of the district attorney and any officer of the Department of Justice may act in the same manner and to the same extent providing he is authorized so to do by the Attorney General. * * * And we are further of the opinion and we do hold that such authorization need not be directed to specifically designated cases but may be designated and

limited descriptively as was done in the instant case by the Attorney General when he authorized Mr. Brett and the attorneys under his immediate direction to act in the kind of cases, to-wit, such land cases as from time to time shall be assigned to the Los Angeles Lands Division office."

145 F.2d at 785. (Emphasis added.)

These cases demonstrate the difficulty the courts have had in deciding whether various appointment letters were "sufficiently specific." United States v. Morse, 292 F. 273, 275 (S.D.N.Y. 1922). There is authority for the proposition that the appointment letters do not have to specify particular persons, cases, or statutes, and that § 515(a) should be given an interpretation favoring the Attorney General's use of its provisions. The common thread running through all these cases, however, is that the appointment letters at the very least described the type of cases which the special attorneys were to present to grand juries. Requiring the

appointment letters to specify the type of cases which the special attorneys are to present is in accord with the congressional intent, as manifested in the House Report set out above to limit the appearances of special attorneys to the "special case which is of "such usual [sic] importance to the Government" that it needs the assistance of an attorney "who is specially or particularly qualified by reasons of his peculiar knowledge and skill." H.R. Rep. No. 2901, supra. Such a requirement limits the power of the Attorney General to supersede the United States attorneys who have the primary power and responsibility for prosecuting "all offenses against the United States." § 547(1)). It is with such a requirement in mind that the recent cases dealing with special attorneys appointed under § 515(a) must be examined.

After the decision in United States v. Powell, 81 F.Supp. 288 (E.D. Mo. 1948), questions concerning the authority of special attorneys to appear before grand juries lay dormant for some twenty-six years. In United States v. Williams, 65

F.R.D. 422 (1974), however, Judge Oliver raised these issues.

The Williams decision produced a nationwide flurry of motions challenging the authority of special attorneys to appear before grand juries and the validity of indictments obtained by these special attorneys. The courts are not agreed on whether the form letters of appointment, identical to that used for the special attorneys in this case, sufficiently comply with the requirement of § 515(a) that the special attorneys be "specifically directed." In United States v. Wrigley, 392 F.Supp. 14 (W.D. Mo., March 11, 1975), 392 F.Supp. 9 (W.D. Mo., Feb. 5, 1975) (Oliver, J.); United States v. Agrusa, 392 F.Supp. 3 (W.D. Mo., Feb. 6, and Feb. 25, 1975) (Oliver, J.); and United States v. Crispino, 392 F.Supp. 764 (S.D.N.Y. 1975) (Werker, J.), indictments were dismissed because the blanket appointment letters lacked any specific direction. Other courts have, however, ruled that special attorneys were properly authorized to appear before the grand jury. In re: Grand Jury Subpoenas Addressed to:

Raymond L. S. Patriarca, et al., 396 F. Supp. 859 (D.R.I. 1975); United States v. DiGirlomo, 393 F.Supp. 997 (W.D. Mo. 1975) (Hunter, J.); United States v. Kazonis, 391 F.Supp. 804 (D. Mass. 1975); United States v. Weiner, 392 F.Supp. 81 (N.D. Ill. 1975); Sandello v. Curran, (No.M 11-188, S.D.N.Y., Feb. 27, 1975) (Tenney, J.); United States v. Brown, 389 F.Supp. 959 (S.D.N.Y. 1975) (Pollack, J.) See also, United States v. Brodson and Halmo, 390 F.Supp. 774 (E.D. Wis. 1975) (Gordon, J.). No court of appeals has yet ruled on the question.

None of the courts upholding the authority of special attorneys to appear before grand juries have seriously questioned the validity of the legislative history set out above, nor the conclusion that the intent of Congress in passing what is now § 515(a) was to facilitate the Attorney General's use of peculiarly qualified attorneys to present special cases to grand juries. Further, the cases discussed above demonstrate that the various Attorneys General recognized that their

power to supersede United States attorneys by virtue of § 515(a) was limited to special cases, and accordingly they did specify, at the very least, the type of cases which the special attorneys were to present to grand juries. See, United States v. Hall, 145 F.2d 781 (9th Cir. 1944), cert. denied, 324 U.S. 871, 65 S.Ct. 1016, 89 L.Ed. 1425 (1945).

In United States v. DiGirlomo, supra, one of the bases for the court's decision upholding the authority of special attorneys to appear before grand juries was that since the enactment of the Act of 1906, Congress has vested the Attorney General with increased statutory power, thereby granting him the raw power to supersede the local United States attorneys, and has abandoned the policy of entrusting primary control of federal prosecutions to the United States attorneys. Such is not the case. The statutory analysis set out above demonstrates that while the Attorney General has substantial supervisory power over the United States attorneys, Congress has not relieved them

from the responsibility of prosecuting all offenses, § 547(1), and has accorded them some degree of independence.

The conclusion that Congress has not abandoned the requirement of § 515(a) that special attorneys be "specifically directed by the Attorney General" is buttressed by the failure of an amendment to § 515(a) in 1945. As set forth in United States v. Crispino, supra, n. 40, identical Senate (S. 1519) and House (H.R. 4470) bills were introduced which would have eliminated § 515(a)'s requirement that special attorneys be "specifically directed by the Attorney General." The Senate Bill was referred to the Committee on the Judiciary on October 26, 1945, but was never reported out.

If special attorneys were allowed to appear in any of the several states for various purposes without specificity in their direction, and with such broad language that there is no limitation to their power, the end result will be a usurpation of the significance, practicality, effectiveness and power of the several United

States Attorneys. The system by which federal districts have their own United States Attorney (District Attorney) is engrained in our system of government and insures decentralization of absolute power. To judicially emasculate the United States Attorneys in contravention of clear congressional mandate constitutes unwarranted surgery and improper use of the legal scalpel. Guarantees have been written into 28 U.S.C. 515(a) and the court may not nullify that legislation absent a direct attack of unconstitutionality. If anything, the passage of time has accentuated the need for reasonable specificity in letters of authority. Past abuses, no matter how long existing, should not be allowed to continue. The recent federal experience at the highest level of the executive branch of government has clearly shown that the concentration of power leads to abuse.

The conclusion evident from the legislative history of § 515(a) is that Congress intended to grant the Attorney General power to supersede the United States

attorneys' responsibilities for presenting cases to grand juries only where a case or a specific area of law enforcement was of such special importance that a specially qualified attorney was desirable. This limitation of the Attorney General's power under § 515(a) was acquiesced in for decades, as the appointment letters specified the types of cases which the special attorneys were to conduct. The fact that § 515(a)'s requirement that the special attorneys be "specifically directed by Attorney General" remains valid is evident from the recent cases discussed above. It is necessary, therefore, to examine the special attorneys' appointment letters to judge whether they comply with the requirement of § 515(a) which has been identified.

The first paragraph of both Mr. Breakstone's and Mr. Lyons; purported appointment letters provide as follows:

"The Department is informed that there have occurred and are occurring in the Northern District of California and other judicial districts of the United States

violations of federal criminal statutes by persons whose identities are unknown to the Department at this time."

The second paragraph appoints each man as a special attorney to assist in the trial of and conduct proceedings in the "aforesaid cases." The only reasonable meaning which can be ascribed to the "aforesaid cases" is that it refers to the cases identified in the first paragraph. But all the first paragraph states is that the cases are ones involving "violations of federal criminal statutes." There is no attempt to specify the particular statutes which are to be enforced or the types of cases which are to be presented to grand juries. There is no attempt to specify what makes these cases of such "particular importance" that a "specially or particularly qualified" attorney is necessary. These letters actually directed Breakstone and Lyon to enter into the Northern District of California "and other judicial districts of the United States" and conduct grand jury proceedings with regard to any cases

involving the violation of any federal criminal statute by any person. In other words, they are authorized to replace the United States attorney in the investigation and prosecution of the criminal laws of the United States

This statement by Judge Werker in United States v. Crispino, supra, is applicable here:

"The commission letter * * * is a bold assertion of authority by the Attorney General to appoint special attorneys in any case regardless of its importance and regardless of whether any particular skill or knowledge is required. If upheld it would allow these special attorneys to supersede the local United States Attorneys and their regular assistants, whose statutory duty for the last 186 years has been to prosecute all offenses against the United States in their districts, in any cases involving a violation of a 'federal criminal statute'.

Congress never intended to give such a broad authority when it passed the Act of 1906 * * *

392 F.Supp. at 779.

The roving commission granted to Mr. Breakstone and Mr. Lyon by their "appointment letters" does not comply with the requirement of § 515(a) that they be "specifically directed by the Attorney General".

Since Mr. Breakstone and Mr. Lyon were not lawfully authorized to appear before the grand jury, their unauthorized presence requires a reversal of Petitioner's convictions based on the indictment returned by said grand jury.

2. CERTIORARI SHOULD BE GRANTED TO REVIEW THE REFUSAL OF THE TRIAL COURT, AFFIRMED BY THE COURT OF APPEALS, TO GRANT PETITIONER'S MOTION FOR A SEPARATE TRIAL.

As is fully argued in Petitioner's Opening [P. 18, et seq.] and Reply Briefs [P. 12, et seq.] in the Ninth Circuit Court Court of Appeals, copies of which have

been lodged with this Court, a severance is proper where a defendant will be prejudiced by a joinder of defendants.

Although Petitioner's Opening Brief [P. 18, et seq.] specifies numerous grounds for the requested severance, the most important are the facts that if a severance were granted, the testimony of DOUGLAS CASSIDY, a co-defendant, would have been available and would have completely exonerated Petitioner. An affidavit was filed on behalf of co-defendant GERALD ENIS in which co-defendant CASSIDY informed the court that he had exculpatory evidence to provide as to ENIS. If a separate trial had been granted, once ENIS took the stand, Petitioner could have fully questioned him since he would have already waived his Fifth Amendment privilege. Absent a separate trial, Petitioner lost his ability to obtain this evidence and present all of the facts to the jury.

Since such exculpatory evidence could have affected the decision of the jury, it was an abuse of discretion for the

trial court to have denied Petitioner a separate trial. In addition, as pointed out in Petitioner's briefs, if a severance had been granted, the bulk of the evidence offered at trial could not have been introduced. The decision of the jury would very likely have been different in such a situation. As such, certiorari should be granted to review such decision by the trial court and subsequently by the Court of Appeals.

3. CERTIORARI SHOULD BE GRANTED TO DETERMINE IF THE COURT OF APPEALS SHOULD HAVE REVERSED THE CONVICTIONS OF PETITIONER DUE TO THE PREJUDICE AND LACK OF IMPARTIALITY OF THE DISTRICT COURT TRIAL JUDGE.

As pointed out in Petitioner's Opening Brief [P. 63, et seq.] before the Ninth Circuit, the trial judge who presided over all motions and proceedings in this case was so partial to the prosecution that the result was a denial of Petitioner's due process rights to a fair trial. As such, Petitioner's convictions should be reversed.

It is always easy to maintain that a trial judge did not possess the requisite impartiality essential to a fair trial and to assure both the dignity of the court and an atmosphere of justice. It is rare, however, when a Judge's own statements make his inability to be impartial eminently clear. In the instant manner the trial judge, upon a motion having been made, made the following statement:

"17 days today, and we've got two days to go, and I don't intend to let anything happen to this case right now. I want to let you know that right now. We are here, and everybody is here, and if anybody is making any motions to sever or any more motions for dismissal or mistrial or what have you, I can give you an in limine decision right now and that's going to be that they are all denied and we are all going to stay here, and we are going to try this case, and if there is any problems, you can take it up with the Appellate Court later on,

but we are here, and we will do it very orderly, and if the defense wants to do it that way, then we will let them do it that way." [R.T. 3058, 3059].

With the various defense lawyers making courteous and appropriate motions, the trial court saw fit to state that if there were any more motions for anything or "what have you", they were all going to be denied. It is axiomatic that a court cannot determine whether it is going to grant or deny a future motion until such motion is made and then upon the facts at that time existing. For a court to indicate that all future motions would be denied removed both the appearance and the fact of a fair trial.

4. CERTIORARI SHOULD BE GRANTED TO DETERMINE IF THE COURT OF APPEALS SHOULD HAVE REVERSED THE CONVICTIONS OF PETITIONER DUE TO THE INTERFERENCE BY THE COURT CLERK WITH MEMBERS OF THE JURY DURING THEIR DELIBERATIONS.
-

As is discussed fully in Petitioner's Opening [P. 65, et seq.] and Reply Briefs [PP. 20 and 21] before the Ninth Circuit, the Court clerk was observed apparently arguing with members of the jury during their deliberations. This was brought to the Court's attention and the trial court said it would determine the nature of the occurrence, but did not inform defense counsel of his findings. Without further information, it must be assumed that prejudice resulted since it is a foundation of our judicial system that the integrity of the jury process in criminal cases be steadfastly protected at all costs. Failure of the trial court to determine the nature of the interchange between the Court clerk and the jury requires reversal of Petitioner's convictions.

5. CERTIORARI SHOULD ALSO BE GRANTED TO DETERMINE WHETHER THE COURT OF APPEALS SHOULD HAVE REVERSED THE CONVICTIONS OF PETITIONER DUE TO THE FOLLOWING, WHICH ARE FULLY DISCUSSED IN PETITIONER'S OPENING [O.B.] AND REPLY BRIEFS [R.B.] BEFORE THE NINTH CIRCUIT.

(A) Prosecutorial misconduct during opening and closing arguments [O.B. P. 34, et seq.; R.B. P. 17, et seq.];

(B) Insufficiency of the evidence [O.B. P. 47, et seq.; R.B. P. 9, et seq.];

(C) Co-counsel's reference to Mafia connections [O.B. P. 56, et seq.; R.B. P. 16, et seq.];

(D) Failure to instruct the jury as requested by Petitioner and instruction of the jury over Petitioner's objections [O.B. P. 59, et seq.];

(E) Varying the Order of Proof as to conspiracy [O.B. P. 62, et seq.];

(F) Refusal to dismiss the entire jury panel due to the prejudice and bias caused by pre-trial publicity [R.B. P. 21, et seq.];

(G) Failure to comply with the mandate of Brady v. Maryland, supra, requiring that exculpatory evidence be timely presented to a defendant accused of crime; and

(H) The Ninth Circuit Court of Appeals either ignored an uncontroverted part of the evidence or misunderstood its significance:

The Appellate Court's Opinion reads as if Senator Dolwig had not been candid with other "clients" of Eurovest. In fact, however, the government called as one of its witnesses BYRON LASKY, a potential client of Eurovest. He testified he went to see Senator Dolwig "looking for some assurances, some confidence-building words." Dolwig told Lasky that his relationship with Eurovest was new and that he had not engaged in any prior transactions with it. He informed Lasky that he, Dolwig, was merely acting as escrow agent and that he had never seen a letter of credit from Eurovest, nor knew of a completed Eurovest transaction. Because of this conversation with Senator Dolwig,

Mr. Lasky decided not to do business with Eurovest. It was a direct result of Dolwig's candor and honesty that Lasky did not become a victim. Dolwig's statements to Lasky are illustrative of his lack of criminal intent and affirmatively show that Dolwig was not a conspirator. This positive showing on Dolwig's behalf clearly indicates innocence and was introduced by the government and cannot be ignored [O.B.].

Each and all of these points denied Petitioner a fair trial and require reversal of his convictions. Appellant RICHARD J. DOLWIG adopts and respectfully asks the Court to consider the points raised and authorities stated in the Petitions for Writ of Certiorari filed on behalf of WALTER STRADLEY and EARL VOGT, including, but not limited to, the failure of the government to properly and adequately conform to the requirements of Brady v. Maryland, supra.

CONCLUSION

For the reasons set forth above, it is respectfully submitted that this Petition for Writ of Certiorari should be granted.

Respectfully submitted
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APPENDIX A

APPENDIX A

UNITED STATES v. KAPLAN

1042

AMENDED: September 6, 1977

UNITED STATES of America,
Appellee,

v.

David KAPLAN, Appellant.

UNITED STATES of America,
Appellee,

v.

David GORWITZ, Appellant.

UNITED STATES of America,
Appellee,

v.

Richard DOLWIG, Appellant.

UNITED STATES of America,
Appellee,

v.

Earl VCGT, Appellant.

UNITED STATES of America,
Appellee,

v.

Walter STRADLEY, Appellant.

UNITED STATES of America,
Appellee,

v.

Douglas CASSIDY, Appellant.

Nos. 76-1319, 76-1318, 75-3418, 75-3423,
75-3428 and 75-3337.

United States Court of Appeals,
Ninth Circuit.

May 26, 1977.

Rehearing and Rehearing En Banc
Denied Sept. 6, 1977.

Seven defendants were indicted
upon multiple charges of mail fraud and
wire fraud, together with conspiracy, in

connection with a fraudulent scheme to
obtain advance fees for promised loans, i.
e., letters of credit, which were never
delivered. Defendants were convicted in
the United States District Court for the
Northern District of California, Samuel
Conti, J., and defendants appealed. The
Court of Appeals held, as to one count,
that use of the mails that is not a step
toward receipt of fruits of the scheme is
not a violation of the mail fraud statute.

Affirmed in part; reversed in part;
remanded for entry of modified sentence
in one case.

1. Criminal Law \Leftrightarrow 753.2(5), 1159.2(1)

Test of sufficiency of evidence,
whether in deciding motion for acquittal
or on review of that decision on appeal,
is whether, viewing evidence in light
most favorable to Government as pre-
vailing party, court is satisfied that jur-
ors reasonably could decide that they
would not hesitate to act in their own
serious affairs upon factual assumptions
as probable as conclusions that defend-
ant is guilty as charged.

2. Conspiracy \Leftrightarrow 47(4)

Evidence including proof that partic-
ular defendant did nothing to stop fraud
or warn others after he had been told
scheme probably was total fraud permitted
jury to infer from evidence that partic-
ular defendant knowingly participated
in conspiracy to defraud. Fed.Rules
Crim.Proc. rule 29, 18 U.S.C.A.; 18 U.S.
C.A. § 1341.

3. Criminal Law \Leftrightarrow 745, 747

It was for jury to resolve evidentiary
conflicts and draw reasonable inferences
therefrom, and they could draw
inference of criminal intent from circum-
stantial evidence. Fed.Rules Crim.Proc.
rule 29, 18 U.S.C.A.

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The Synopses, Syllabi and Key Number Clasifi-
cation constitute no part of the opinion of the court.

4. Conspiracy \Leftrightarrow 47(4)

Evidence which showed that one particular defendant was deeply involved in most of fraudulent transactions and that he and another defendant continually engaged in reassuring victims as to legitimacy of their operation and that the latter defendant was courier of nonexistent letters of credit and took possession of at least part of advance funds which eventually found their way into joint bank account in Bahamas belonging to both such defendants permitted jury to find guilt of conspiracy. 18 U.S.C.A. §§ 371, 1341.

5. Criminal Law \Leftrightarrow 554

Jury was not compelled to believe testimony of particular defendant, who made false representations, that he was acting solely in role of FBI informer. Fed.Rules Crim.Proc. rule 29, 18 U.S.C.A.

6. Conspiracy \Leftrightarrow 41

Where at least one of appealing defendants performed one or more of illegal acts charged, and acts charged were in furtherance of conspiracy, all of them became guilty of substantive acts by virtue of their participation in the conspiracy. Fed.Rules Crim.Proc. rule 29, 18 U.S.C.A.; 18 U.S.C.A. § 371.

7. Post Office \Leftrightarrow 35(2)

To violate mail fraud statute, defendant must be involved in scheme to defraud, and he must cause mailing for purpose of executing that scheme. 18 U.S.C.A. § 1341.

8. Post Office \Leftrightarrow 49(11)

Evidence permitted finding that there was scheme to defraud, that particular defendant was involved, and that mailing occurred, and that such defendant caused mails to be used in that it was reasonably foreseeable that his oral representations would result in use of mails to obtain written confirmation, but

where, although oral representations made by particular defendant were in furtherance of fraudulent scheme, such letter in response to the representations was not, conviction for mail fraud could not be sustained. 18 U.S.C.A. § 1341.

9. Post Office \Leftrightarrow 35(8)

Use of mails that is not step toward receipt of fruits of scheme is not violation of mail fraud statute. 18 U.S.C.A. § 1341.

10. Criminal Law \Leftrightarrow 622(4, 5)

Motions to sever must be timely made and properly maintained, or right to severance will be deemed waived. Fed.Rules Crim.Proc. rule 14, 18 U.S.C.A.

11. Criminal Law \Leftrightarrow 1044.2(2)

To preserve point, motion to sever must be renewed at close of all evidence, but requirement is not inflexible, and waiver may be absent if motion accompanies introduction of evidence deemed prejudicial and if renewal at close of all evidence would constitute unnecessary formality; diligent pursuit of severance motion is the guiding principle. Fed.Rules Crim.Proc. rule 14, 18 U.S.C.A.

12. Criminal Law \Leftrightarrow 622(1)

Ordinarily denial of motion to sever must be viewed as of time of denial; only in rare cases will trial court's failure to reopen, *sua sponte*, question of severance constitute abuse of discretion. Fed.Rules Crim.Proc. rule 14, 18 U.S.C.A.

13. Criminal Law \Leftrightarrow 622(1)

Trial court, in considering motion to sever based upon defendant's insistence that codefendant will provide exculpatory testimony after severance, must weigh, *inter alia*, good faith of defendant's attempt to have codefendant testify, possible weight and credibility of predicted testimony, probability that it will

materialize, economy of joint trial, and possibility that trial strategy of a codefendant will be prejudicial. Fed.Rules Crim.Proc. rule 14, 18 U.S.C.A.

14. Criminal Law \Leftrightarrow 622(5)

Any right of particular defendant to severance was waived by failure to diligently pursue motion made before trial. Fed.Rules Crim.Proc. rule 14, 18 U.S.C.A.

15. Criminal Law \Leftrightarrow 622(5)

Where trial court had indicated that renewal of severance motion would be useless, right to seek severance was not waived by failure to renew motion at close of all evidence. Fed.Rules Crim.Proc. rule 14, 18 U.S.C.A.

16. Criminal Law \Leftrightarrow 622(3)

Affidavit by codefendant would have strengthened credibility of his proposed testimony, for purposes of determining whether motion for severance was properly denied, but affidavit would not be required under circumstances of case, in which summaries by counsel were furnished. Fed.Rules Crim.Proc. rule 14, 18 U.S.C.A.

17. Criminal Law \Leftrightarrow 622(3)

Summaries of expected testimony which demonstrated only "remote likelihood" that exculpatory testimony by codefendant would become available were insufficient to establish abuse of discretion in denying motion for severance. Fed.Rules Crim.Proc. rule 14, 18 U.S.C.A.

18. Criminal Law \Leftrightarrow 622(2)

Where particular defendant obtained benefit of codefendant's opinion that particular defendant was victim of wrongdoing rather than wrongdoer, through cross-examination of agents, agents' testimony was not adequate substitute but strengthened resolve of reviewing court not to characterize trial court's refusal to sever as abuse of dis-

cretion. Fed.Rules Crim.Proc. rule 14, 18 U.S.C.A.

19. Criminal Law \Leftrightarrow 622(2)

Where certain evidence was put before jury which was admissible with respect to other defendants but not admissible against particular defendant, fundamental issue was whether jury could be expected to keep separate the evidence as it pertained to each jointly tried defendant, and best indication of such ability of jury to compartmentalize was its failure to convict all defendants. Fed.Rules Crim.Proc. rule 14, 18 U.S.C.A.

20. Criminal Law \Leftrightarrow 1169.1(1)

Complaint of references during trial and entrapment defense of codefendant were not grounds for reversal of conviction where reviewing court concluded that jury could and did compartmentalize the evidence properly.

21. Criminal Law \Leftrightarrow 822(1)

Adequacy of jury instructions is not determined by giving or failure to give any one or more instructions but by examining instructions as a whole.

22. Criminal Law \Leftrightarrow 829(3)

Entrapment instruction given by court, when read in pari materia with instructions on specific intent, willfulness and knowledge, adequately presented defense of lack of criminal intent, and there was no error in refusing to give particular instruction sought by particular defendant in mail fraud and conspiracy prosecution, including requested instruction relating to such defendant's claim that it lacked requisite criminal intent because he was acting as government informant. 18 U.S.C.A. §§ 371, 1341, 2314.

23. Criminal Law \Leftrightarrow 829(3)

Where, although one identical specific-intent instruction was given as to

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all defendants in prosecution for mail fraud, wire fraud, and conspiracy, court did instruct jury that each defendant was entitled to have his case determined from evidence as to his own acts and statements and conduct, leaving out of consideration entirely any evidence admitted solely against some other defendant or defendants, particular defendant was not prejudiced by absence of separate specific-intent instruction applicable to him alone.

24. Criminal Law \Leftrightarrow 706(2)

In view of issue whether particular defendant was abused, faithful, confidential informer or faithless double agent, resolution of which required that beginning of story be told, there was no error in Government's bringing up, during questioning of federal agent, point that particular defendant had first come to attention of FBI when that agency was asked to watch such defendant board plane for England so that his attire could be described to Scotland Yard, nor was there error in supplementation by hearsay intelligence that such defendant was of interest because of his possible role in international transportation of stolen securities.

25. Criminal Law \Leftrightarrow 1037.1(3)

Record failed to demonstrate that there was fundamentally erroneous failure on part of prosecutor to present exculpatory evidence of particular defendant's status as government informer, in view of fact that defendant failed to show that his role as informer actually exculpated him and that he was therefore prejudiced by the challenged prosecutorial conduct.

* The Honorable James M. Fitzgerald, United States District Judge for the District of Alaska, sitting by designation.

26. Indictment and Information \Leftrightarrow 144, 144.2

Motions to dismiss indictment must be made before trial or they are waived, but trial court may defer determination of the motion or grant relief from waiver for good cause. Fed.Rules Crim.Proc. rules 12(b)(2), (f), 52(b), 18 U.S.C.A.

27. Indictment and Information \Leftrightarrow 144

Failure to include particular ground in pretrial motion to dismiss indictment was excusable where defendant did not receive transcript of relevant grand jury proceedings until midway through trial, but there was no similar excuse for failure to renew motion during trial. Fed. Rules Crim.Proc. rules 12(b)(2), (f), 52(b), 18 U.S.C.A.

28. Grand Jury \Leftrightarrow 34

Prosecution may exercise wide discretion in grand jury proceedings.

Appeals from the United States District Court for the Northern District of California.

Before GOODWIN and SNEED, Circuit Judges, and FITZGERALD.* District Judge.

PER CURIAM: **

Seven defendants were indicted upon multiple charges of mail fraud and wire fraud, together with conspiracy, in connection with a fraudulent scheme to obtain advance fees for promised loans (letters of credit) which were never delivered. The six appellants whose combined appeals are now before us present a wide variety of challenges to their convictions.

** Because of the number and complexity of the issues, all members of the panel participated in the writing of this opinion.

UNITED STATES v. KAPLAN**I. FACTS**

During the last part of 1974, a high demand for venture capital to develop real estate stimulated efforts to find money outside of traditional banking channels. All the methods, both legitimate and illegitimate, traded upon the willingness of developers to pay a premium for venture capital. David Kaplan and David Gorwitz, two of the appellants, were early organizers of a corporate entity known as Eurovest, chartered in the Cayman Islands, British West Indies. Eurovest, through one or more of the defendants, located individuals who were seeking to borrow large sums of money, and promised to arrange letters of credit. The victims were told that the letters of credit could be pledged to obtain capital for their projects.

In return for the promised financing, Eurovest would request ownership of some percentage of the venture. Most important, Eurovest required the victims to pay an "advance fee" to cover the alleged expenses of securing the letters of credit. More than \$150,000 in advance fees were paid to Eurovest, but no letters of credit were ever issued nor were the advance fees returned.

Viewed in a light most favorable to the government, the evidence produced at trial showed that each of the appellants played a role in the scheme.

Appellant Vogt was a management consultant from New York. He testified that the major service he offers his clients is aid in locating financing for business ventures. Vogt was the initial contact between Eurovest and eight of the thirteen businessmen who negotiated with Eurovest. Each of the eight men Vogt contacted subsequently dealt with appellant Stradley, who was the acting attorney for Eurovest.

Vogt represented to the victims that Eurovest was backed by a prestigious and wealthy Florida family (the Duvals), and that Eurovest had millions of dollars in securities which could be pledged to secure letters of credit.

Appellant Dolwig was prominent in state politics. He was made the trustee of the "escrow" account into which the advance fees were paid. As a California state senator, his connection with Eurovest was supposed to lend credibility and prestige to the enterprise. On occasion, Senator Dolwig reassured victims as to the substantiality of the principals behind Eurovest. His main function in the scheme was to receive advance fees, hold them in his trust account, and turn them over to Eurovest upon written instructions from the corporation.

Appellant Cassidy, an insurance agent, sent insurance binders to some of the victims. These binders purported to protect any advance fees paid by the victims in the event that the promised letters of credit were not forthcoming. From time to time, Cassidy was called upon to vouch for the reliability of the Eurovest enterprise.

The mastermind of the scheme apparently was David Kaplan. It was Kaplan who approved the "loans" to various victims, engaged Senator Dolwig to become the west coast "escrow", convinced the Duval family to lend its name to Eurovest by furnishing the sole director and trustee of the corporation. Kaplan also personally negotiated with most of the victims.

Appellant Gorwitz worked with Kaplan. Gorwitz was the international money courier. Most of the fees from the victims were paid into Dolwig's account and then were turned over to Gorwitz. It was Gorwitz who was to

deliver the letters of credit to the victims.

Much of the government's proof centered around the experience of one Paul Heck. Heck paid \$60,000 in advance fees to Eurovest. When Eurovest failed to deliver its promised letter of credit, Heck began to pursue the Eurovest principals around the country. He made representations to Kaplan, Dolwig, Vogt, and Stradley that the entire Eurovest operation was fraudulent. Heck also warned Arthur Lachman, a broker who was dealing with Eurovest on behalf of a client named Conrad Preiss. Lachman, in turn, warned Vogt and Stradley. This evidence became important when some of the defendants insisted that their representations to the victims of Eurovest had been made in good faith.

II. SUFFICIENCY OF THE EVIDENCE

A. Conspiracy Counts

All the appellants challenge the trial court's denial of the motions for acquittal under Fed.R.Crim.P. 29 and for a new trial, on the grounds that the evidence was insufficient to convict them.

[1] As a practical matter, the trial court in deciding a motion for acquittal in a criminal case and the court reviewing that decision on appeal use the same test. *United States v. Leal*, 509 F.2d 122 (9th Cir. 1975); *United States v. Nelson*, 419 F.2d 1237, 1241 (9th Cir. 1969). That is, viewing the evidence in a light most favorable to the government as prevailing party, is the court satisfied that the jurors reasonably could decide that they would not hesitate to act in their own serious affairs upon factual assumptions as probable as the conclusions that the defendant is guilty as charged? *United States v. Nelson*, *supra*.

With that test in mind, we turn to appellants' arguments:

1. Dolwig.

[2] The government's proof at trial showed that, among other things, Dolwig performed the following acts in relation to the Eurovest scheme: As trustee of the account into which the advance fees were deposited, he participated in setting up a fictitious "escrow". There was no escrow, and Dolwig knew it. The account was simply a conduit to move money from the victims to Gorwitz. Dolwig reassured Paul Heck as to the substantiality of the Eurovest principals; he failed to inform other Eurovest "clients" after he knew of problems Paul Heck was having in securing his letter of credit; he appeared with appellant Kaplan in a hotel different from the one in which Kaplan had told Heck he would be, and Dolwig's wife aided Kaplan in eluding Heck.

Dolwig does not question the factual accuracy of the government's proof, but contends that it fails to establish the requisite intent on his part to join or participate in the conspiracy. Dolwig claims that he himself was a victim who was duped into lending his good name to the Eurovest enterprise. This was a question for the jury. Although the evidence against Dolwig is entirely circumstantial, it does not have to exclude every hypothesis but that of guilt. *United States v. Nelson*, *supra*. Once the existence of a conspiracy is shown, only slight evidence is needed to connect a defendant with it. *United States v. Marotta*, 518 F.2d 681, 684 (9th Cir. 1975); *Fox v. United States*, 381 F.2d 125, 129 (9th Cir. 1967).

The jury could infer from the evidence that Dolwig knowingly participated in the conspiracy. It was proved that he

did nothing to stop the fraud or warn others after Heck had told him that the scheme probably was a total fraud. " * * * [A] conspirator's intent to defraud may be inferred from the fact that he personally knew that the venture was operating deceitfully * * *." *Phillips v. United States*, 356 F.2d 297, 303 (9th Cir. 1965), cert. denied, 384 U.S. 952, 86 S.Ct. 1573, 16 L.Ed.2d 548 (1966). As we hold that the jury's decision had support in the evidence, we must affirm Dolwig's conviction of conspiracy in this case.

2. Vogt and Stradley.

Both Vogt and Stradley admit that they engaged in various business transactions on behalf of Eurovest. However, they claim that they were duped into believing that Eurovest was a legitimate operation. Vogt testified that, but for a lack of funds, he would have invested his own money in Eurovest letters of credit.

The government contends that Vogt and Stradley intended to defraud, and that such intent was shown by their conduct after receiving warnings from both Heck and Lachman that the scheme was a fraud. That is, Vogt and Stradley continued to negotiate deals with other Eurovest victims without any mention of Heck's and Lachman's warnings and accusations.

[3] Credibility was for the jury. The jury had to resolve evidentiary conflicts and draw reasonable inferences therefrom. *United States v. Nelson*, *supra*; *United States v. Barham*, 466 F.2d 1138, 1140 (9th Cir. 1972), cert. denied, 410 U.S. 926, 93 S.Ct. 1356, 35 L.Ed.2d 587 (1973). An inference of criminal intent can be drawn from circumstantial evidence. *United States v. Childs*, 457 F.2d 173 (9th Cir. 1972); *United States v. Oswald*, 441 F.2d 44 (9th Cir. 1971).

We agree with the trial judge that the jury could reasonably have inferred from the evidence that Vogt and Stradley possessed the intent to participate in the conspiracy.

3. Kaplan and Gorwitz.

[4] By reference to the briefs of the other appellants, Gorwitz and Kaplan challenge the sufficiency of the evidence which led to their conspiracy conviction. It cannot, however, be seriously contend-ed that the evidence as to these two appellants is insufficient.

There was ample testimony, which the jury reasonably could believe, showing that Kaplan was deeply involved in most of the fraudulent Eurovest transactions. Gorwitz and Kaplan continually engaged in reassuring victims as to the legitimacy of their operation.

Gorwitz was named as courier of the nonexistent letters of credit. Additionally, he took possession of at least part of the advance funds which had been deposited in the Dolwig "escrow" account. These funds eventually found their way into a joint bank account in the Bahamas which belonged to Kaplan and Gorwitz.

At trial, Kaplan, testifying in his own behalf, attempted to place the culpability for this enterprise upon unindicted co-conspirator Duval. The government provided testimony to the contrary which the jury was entitled to believe. The evidence connecting Kaplan and Gorwitz with the conspiracy is more than sufficient.

4. Cassidy.

[5] By reference to the briefs of the other appellants, Cassidy challenges the sufficiency of the evidence which convicted him of the conspiracy in this case.

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At trial, the government produced evidence which showed that Cassidy was actively involved in the Eurovest operation. He made false representations concerning the enterprise and he sold insurance "binders" which purported to protect any fees advanced by the victims. These "binders" were an integral part of the scheme. Victims would not proffer advance fees without some form of protection. In fact, however, Cassidy's "binders" did not protect the fees, and Cassidy knew that his "binders" were worthless.

Cassidy does not contest most of these facts. Instead he argues that he did not have any intent to join and participate in the conspiracy. On the contrary, he says, he was acting solely in the role of an F.B.I. informer throughout his association with Eurovest.

The government produced witnesses who testified that Cassidy went beyond his informant role in making false representations to Eurovest victims. Also, the testimony showed that Cassidy did not inform the F.B.I. that he had made such representations.

The jury was entitled to believe that Cassidy actively participated in the Eurovest scheme and that he had the necessary intent to defraud. The jury was not required to believe that Cassidy was acting solely as a government informant, and it did not. Therefore, we affirm Cassidy's conviction on the conspiracy count.

B. Substantive Counts

[6] With one exception, the evidence was sufficient to support the convictions of the appellants on all substantive counts charged. At least one of the appellants performed one or more of the illegal acts charged, and the acts charged were in furtherance of the conspiracy.

All the appellants became guilty of the substantive acts by virtue of their participation in the conspiracy. *Pinkerton v. United States*, 328 U.S. 640, 66 S.Ct. 1180, 90 L.Ed. 1489 (1946).

The one exception is Count 22, which charges the appellants with mail fraud in connection with a letter sent from Arthur Lachman to Cassidy. We find that the evidence is insufficient to support a conviction on this count. The court should have granted the Rule 29 motion for acquittal on Count 22.

Lachman was a "money broker" who was negotiating with Eurovest on behalf of his clients. Lachman was concerned with obtaining insurance to protect any advance fees which were paid into the Dolwig account. In his negotiations with Eurovest, Lachman had occasion to speak with Cassidy in a conference call which included Kaplan. Cassidy made representations to Lachman concerning the extent of coverage that Cassidy's insurance company would provide.

Some time after this phone call, Lachman mailed the Count 22 letter to Cassidy. In it he asked for a confirmation of the oral representations Cassidy had made on the telephone. Cassidy sent no such confirmation.

[7] The letter from Lachman to Cassidy could not form the basis of the mail fraud charged in Count 22 of the indictment, 18 U.S.C. § 1341. To violate § 1341, a defendant must be involved in a scheme to defraud, and he must cause a mailing for the purpose of executing that scheme. *Pereira v. United States*, 347 U.S. 1, 74 S.Ct. 358, 98 L.Ed. 435 (1954).

[8, 9] The evidence supports a finding that (a) there was a scheme to defraud, (b) Cassidy was involved, and (c) a mailing occurred. Furthermore, the evidence

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supports the conclusion that Cassidy caused the mails to be used in that it was reasonably foreseeable that Cassidy's oral representations to Lachman would result in the use of the mails to obtain a written confirmation. See *United States v. Maze*, 414 U.S. 395, 399, 94 S.Ct. 645, 38 L.Ed.2d 603 (1974); *Pereira v. United States*, 347 U.S. at 8-9, 74 S.Ct. 358.

However, to affirm this conviction we must also find that this mailing was in furtherance of the scheme to defraud. Use of the mails that is not a step toward receipt of the fruits of the scheme is not a violation of § 1341. *United States v. Maze*, *supra*; *Kann v. United States*, 323 U.S. 88, 65 S.Ct. 148, 89 L.Ed. 88 (1944); *United States v. Staszczuk*, 502 F.2d 875 (7th Cir. 1974), modified *en banc on other grounds*, 517 F.2d 53, cert. denied, 423 U.S. 837, 96 S.Ct. 65, 46 L.Ed.2d 56 (1975); *Henderson v. United States*, 425 F.2d 134 (5th Cir. 1970).

Although the oral representations made by Cassidy were in furtherance of the Eurovest scheme, the letter from Lachman in response to those representations was not. Therefore, the convictions of those appellants who were convicted on Count 22 of the indictment are reversed.

III. SEVERANCE FROM TRIAL OF CASSIDY

Appellants Kaplan, Gorwitz, Vogt, Stradley, and Dolwig insist that each should have had his trial severed from that of Cassidy. Each insists that his joinder with Cassidy prejudiced him sufficiently to require severance pursuant to Fed.R.Crim.P. 14.

[10, 11] To evaluate these contentions it is helpful to set forth certain principles. Motions to sever must be timely made and properly maintained, or the

right to severance will be deemed waived. *United States v. Figueroa-Paz*, 468 F.2d 1055 (9th Cir. 1972). To preserve the point, the motion to sever must be renewed at the close of all evidence. 468 F.2d at 1057. This requirement is not an inflexible one; waiver may be absent when the motion accompanies the introduction of evidence deemed prejudicial and a renewal at the close of all evidence would constitute an unnecessary formality. Diligent pursuit of a severance motion is the guiding principle. *United States v. Burnley*, 452 F.2d 1133 (9th Cir. 1971); *Williamson v. United States*, 310 F.2d 192 (9th Cir. 1962). Premature motions to sever not diligently pursued as the prejudicial evidence unfolds cannot serve as insurance against an adverse verdict.

On another occasion we have observed:

"The power vested in the district court pursuant to Rule 14 is discretionary, and the only question on appeal is whether such discretion has been abused. *Parker v. United States*, 404 F.2d 1193 (9th Cir. 1968), cert. denied, 394 U.S. 1004, 89 S.Ct. 1602, 22 L.Ed.2d 782 (1969). The test is whether a joint trial is so prejudicial to one defendant as to require the exercise of that discretion in only one way, that is, by ordering a separate trial." *United States v. Thomas*, 453 F.2d 141, 144 (9th Cir.), cert. denied, 405 U.S. 1069, 92 S.Ct. 1516, 31 L.Ed.2d 801 (1971).

See *United States v. Echeles*, 352 F.2d 892, 896 (7th Cir. 1965).

[12] In determining whether the trial court abused its discretion, ordinarily we must view its denial of a motion to sever as of the time of denial. Only in rare cases will a trial court's failure to reopen, *sua sponte*, the question of severance constitute an abuse of discretion.

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Byrd v. Wainwright, 428 F.2d 1017, 1019 n.1 (5th Cir. 1970).

[13] The trial court, in considering a motion to sever based upon a defendant's insistence that a codefendant will provide exculpatory testimony after severance, must weigh, *inter alia*, the good faith of the defendant's intent to have a codefendant testify, the possible weight and credibility of the predicted testimony, the probability that such testimony will materialize, the economy of a joint trial, and the possibility that the trial strategy of a codefendant (a decision to plead guilty, for example) will prejudice the defendant seeking severance. *Byrd v. Wainwright*, 428 F.2d at 1019-20. Our review of the trial court's exercise of its discretion must recognize the complexity and difficulty of this process of weighing.

[14] Applying these principles to the denial by the trial court of the motions to sever by appellants Kaplan and Gorwitz presents little difficulty. In neither instance was the motion diligently pursued; hence any right to severance was waived. Both moved for a severance before trial, but such motions were not renewed when Cassidy indicated he would not testify and the existence of the FBI form 302 containing the allegedly exculpatory statements became known.

[15] The circumstances are different with respect to Vogt, Stradley, and Dolwig. Each pursued diligently the motion to sever, renewing it during trial at the time Cassidy refused to testify, and when the existence of the FBI form became known. Although none of the three renewed the motion at the close of all evidence, the trial court had previously indicated that a renewal would be useless. Under these circumstances nei-

ther Vogt, Stradley, nor Dolwig waived his right to seek a severance.

[16] Turning to appellants Vogt and Stradley initially, it is clear that each intended in good faith to attempt to induce Cassidy to testify. Also, by means of summaries by their counsel of the tenor of Cassidy's testimony which they expected, they sufficiently demonstrated the exculpatory character of Cassidy's expected testimony. Although an affidavit by Cassidy would have strengthened the credibility of this proposed testimony, we are not prepared to require such an affidavit under the circumstances of this case. Cf. *United States v. Shuford*, 454 F.2d 772 (4th Cir. 1971).

[17] However, these summaries did not indicate a reasonable probability that Cassidy would give his exculpatory testimony. Cf. *United States v. Shuford*, *supra*. By contrast, the affidavits accompanying the motion to sever by defendant Enis did indicate a willingness on the part of Cassidy to testify on behalf of Enis. No such indication appears in the statements supporting the severance motions of Vogt and Stradley. At best these summaries only demonstrated a "remote likelihood" that Cassidy's exculpatory testimony would become available. That is not enough. See *United States v. Thomas*, *supra*.

[18] It is also true that Vogt obtained the benefit of Cassidy's opinion that Vogt was a "victim" of wrongdoing rather than a wrongdoer, through the cross-examination of Agents McKee and Bumpers. While the agents' testimony is not an adequate substitute for Cassidy's, it does strengthen our resolve not to characterize the trial court's refusal to sever as an abuse of discretion.

What has been said concerning appellants Vogt and Stradley is equally applicable to appellant Dolwig. The summa-

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ry of the anticipated Cassidy testimony prepared by Dolwig's counsel reflected no reasonable probability that Cassidy would testify had Dolwig's trial been severed. Indeed, it would be unusual to expect such testimony. Moreover, the contents of this summary were read into evidence, thereby somewhat lessening any prejudicial effect of Cassidy's refusal to testify in the trial.

[19] Dolwig also argues, relying on *United States v. Donaway*, 447 F.2d 940, 943 (9th Cir. 1971), that failure to sever him was an abuse of discretion because certain evidence put before the jury, while admissible with respect to other defendants, was not admissible against Dolwig. We believe the facts in *Donaway* far more clearly indicate an abuse of discretion than those present in this case. The fundamental issue is whether the jury can be expected to keep separate the evidence as it pertains to each jointly tried defendant. *Fernandez v. United States*, 329 F.2d 899, 906 (9th Cir. 1964). As *Fernandez* observes, the best indication of the jury's ability to compartmentalize is its failure to convict all defendants. 329 F.2d at 906. The failure to convict Enis provides such an indication here. Moreover, our view of the record convinces us that the jury was able to keep separate the evidence as it pertained to Dolwig.

[20] Finally, Dolwig contends that he was unduly prejudiced by references during the trial to the Mafia and by Cassidy's entrapment defense. Both invoke the *Fernandez* inquiry, and both must be disposed of in the same manner as was Dolwig's complaint regarding evidence inadmissible as to him. We be-

I. Dolwig was convicted on two counts (Counts 21, 22) of violating 18 U.S.C. § 1341. In part II(B) of this court's opinion, his conviction on

lieve the jury could, and did, compartmentalize the evidence properly.

Obviously our refusal to hold that the trial court abused its discretion in refusing to sever Vogt, Stradley, and Dolwig from the trial of Cassidy is influenced by the truism that joint trials are usually less burdensome to the prosecution than separate trials. This economy does not entitle us to treat lightly, however, appeals based on refusals to order separate trials. Joint trials do alter the emotional and factual setting within which an individual's guilt or innocence is to be determined. Our task on review is to review carefully the record to determine whether the trial court abused its discretion in ordering a joint trial. We have made that review and hold that no such abuse exists in this case. *United States v. Wood*, 550 F.2d 435 (9th Cir. 1976).

IV. THE INSTRUCTIONS

1. *Dolwig*

Dolwig contends that the trial court committed reversible error when it gave the government's proposed instructions relating to mail fraud (18 U.S.C. § 1341), transportation fraud (18 U.S.C. § 2314), and conspiracy to commit such offenses (18 U.S.C. § 371), on the ground that there was no evidence presented to support those charges. But we have indeed found evidence sufficient to support Dolwig's conviction on all substantive counts, with the exception of Count 22 charging mail fraud.¹ Furthermore, we have rejected his argument that the government failed to establish the requisite intent to support the conspiracy con-

Count 22 is reversed. Dolwig was also convicted of four counts of transportation fraud and one count of conspiracy.

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viction. Thus, the instructions, except parts relating to Count 22, are clearly supported by the evidence.

Dolwig also asserts error in the refusal to give three requested instructions pertaining to his theory of defense. He relies on *Baker v. United States*, 310 F.2d 924, 930 (9th Cir. 1962), cert. denied, 372 U.S. 954, 83 S.Ct. 952, 9 L.Ed.2d 978 (1963). The three requested instructions² relate to Dolwig's purported role as an "escrow holder", innocent of all wrongdoing and himself a victim of the Eurovest scheme.

[21] While it is clear that the trial judge must instruct the jury as to the defendant's theory of the case, the instructions given need not be in the precise language requested by the defendant. *Charron v. United States*, 412 F.2d 657, 660 (9th Cir. 1969); *Rivers v. United States*, 368 F.2d 362, 364 (9th Cir. 1966). The refusal to give a requested instruction is not error "if the charge as a whole adequately covers the theory of the defense." *United States v. Blane*, 375 F.2d 249, 252 (6th Cir. 1967), cert. denied, 389 U.S. 835, 88 S.Ct. 41, 19 L.Ed.2d 96 (1967), reh'g denied, 389 U.S. 998, 88 S.Ct. 459, 19 L.Ed.2d 503 (1967).

2. Defendant Dolwig's Proposed Jury Instruction No. 1:

"In each instance in which the Defendant, RICHARD DOLWIG is charged, he purported to act as an escrow agent. If you find from all of the evidence that he believed that this was his role, that he did not mislead any third persons with reference to his role and that he had no knowledge that the role which he accepted was part of any scheme of any others to commit any offense charged, or if you have a reasonable doubt as to the above, then you must find Defendant, RICHARD DOLWIG not guilty as to all counts."

Defendant Dolwig's Proposed Jury Instruction No. 2:

"The mere fact standing alone that a particular defendant may have held a sum of money

Thus, the adequacy of the jury instructions is "not be determined by the giving, or failure to give, any one or more instructions," but by examining the instructions as a whole. *Beck v. United States*, 305 F.2d 595, 599 (10th Cir. 1962); *United States v. Alvarez*, 469 F.2d 1065, 1067 (9th Cir. 1972); *United States v. Moore*, 522 F.2d 1068, 1079 (9th Cir. 1975), cert. denied, 423 U.S. 1049, 96 S.Ct. 775, 46 L.Ed.2d 637.

Viewed in their entirety, the instructions thoroughly elaborated on the terms "knowingly," "willfully," "specific intent," and "intent to defraud." While Dolwig's requested instructions were refused, the given instructions provided the jury with adequate guidance to consider evidence relating to the defense that he was an escrow holder, innocent of any wrongdoing.

Finally, Dolwig challenges Instruction 32, regarding knowing participation in a scheme to defraud, as being unfairly tailored to the facts of the case, and the refusal of the trial court to give an instruction on the requirement of actual knowledge as an essential element of each offense. The instructions, when viewed as a whole, adequately charged

for a period of time is not sufficient upon which you may base a verdict of guilty. In order to return a guilty verdict, based on such a fact, you must also find beyond a reasonable doubt that such person had an intent to defraud."

Defendant Dolwig's Proposed Jury Instruction No. 3:

"If you find that Defendant, RICHARD DOLWIG, believed that persons dealing in matters in which he was to be escrow agent would either receive letters of credit or have their money refunded, or if you entertain a reasonable doubt of such belief on his part, then you must find him innocent as to all counts in which he is charged."

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the jury on knowledge. Instruction 32 properly addressed the law applicable to the prosecution counts. Therefore, Dolwig's latter contentions must be rejected.

2. Cassidy

[22] Appellant Cassidy contends that his conviction³ must be reversed because of the trial court's refusal to give two requested jury instructions. Requested Instruction No. 3⁴ relates to his claim that he lacked the requisite criminal intent because he was acting as a government informant. Requested Instruction No. 2⁵ deals with the related claim that he acted in conformity with the agreement of nonprosecution he entered into with the Government. Cassidy further argues that the standard entrapment instruction⁶ given by the trial court did not adequately present his defense of lack of *mens rea*.

Cassidy's contentions concerning the insufficiency of the instructions, like Dolwig's, must be rejected. During trial, Cassidy attempted to show that he "honestly and reasonably thought the actions and representations he was making to others were in the course of his activities as an informant." Through the testimony of FBI agents Bumpers and McKee, he tried to adduce evidence of entrapment from government encourage-

3. Cassidy was convicted on one count (Count 16) of wire fraud, two counts (Counts 21, 22) of mail fraud, one count (Count 27) of racketeering, and one count (Count 28) of conspiracy. Count 22 was reversed as to all defendants.

4. "If you find the evidence in this case shows that defendant CASSIDY honestly and reasonably thought the actions and representations he was making to others were in the course of his activities as an informant or government agent you should acquit him on all counts."

5. "If you find the evidence in this case is that:
1) Defendant CASSIDY entered into an agreement with the government through its agents

ment of his activities and his own adherence to, and reliance upon, the agreement of nonprosecution with government prosecutors in Los Angeles. The entrapment instruction given by the court, when read *in pari materia* with the instructions on specific intent, willfulness, and knowledge, adequately presented the defense of lack of criminal intent. See *United States v. Elksnis*, 528 F.2d 236, 238 (9th Cir. 1975). The trial judge did not commit error in refusing to give the particular instructions Cassidy sought. See *Rivers v. United States, supra*.

[23] Cassidy additionally challenges the complete "package" of instructions as being insufficiently tailored to the unique facts underlying his informant defense to enable the jury to assess his culpability separately from that of his codefendants. Although one identical specific-intent instruction was given as to all defendants, the trial court did instruct the jury that "each defendant is entitled to have his case determined from evidence as to his own acts and statements and conduct, * * * leaving out of consideration entirely any evidence admitted solely against some other defendant or defendants." Cassidy was not prejudiced by the absence of a separate specific-intent instruction applicable to him alone.

to cooperate with it by providing information in exchange for a promise of non-prosecution and 2) that defendant CASSIDY has substantially complied with his part of the agreement, then you must acquit DOUGLAS CASSIDY on all counts.

"Substantially complied with means that Defendant CASSIDY has provided the basic information and performed in a manner asked and that there is no omission of the essential requirements expected of him and that the information that was provided was satisfactory for the case under investigation."

6. I Devitt and Blackmar, *Federal Jury Practice and Instructions* § 13.13 (2d ed. 1970).

V. PROSECUTORIAL MISCONDUCT

[24] Cassidy contends that he should have been granted a mistrial because the government brought up, during the questioning of a federal agent, the point that Cassidy had first come to the attention of the FBI when that agency was asked to watch Cassidy board a plane for England so his attire could be described to Scotland Yard. This more or less harmless remark was shortly supplemented by the hearsay intelligence that Cassidy was of interest because of his possible role in the international transportation of stolen securities. While the prosecutor's inept control of the questioning at that point raises some questions about prosecutorial good faith, there was no basis for mistrial. At issue was whether Cassidy was an abused, faithful, confidential informer or a faithless double agent. Resolution of that issue requires that the story's beginning be told. This is what the prosecutor drew from the agent and what Cassidy's counsel previously had carefully avoided. Defense counsel correctly extracted only those portions of the story that tended to support his theory of the case. The prosecutor followed the same course from the point of view of the government. We detect no error.

VI. CASSIDY'S CHALLENGE TO THE INDICTMENT

[25-28] Appellant Cassidy argues for the first time on appeal that the prosecutor's failure to present exculpatory evidence of his status as a government informer to the grand jury requires a dismissal of the indictment against him.⁷

⁷. Motions to dismiss an indictment must be made before trial or they are waived. Fed.R.Crim.P. 12(b)(2), (f); see, e. g., *Mitchell v. United States*, 434 F.2d 230 (9th Cir. 1970), cert. denied, 402 U.S. 946, 91 S.Ct. 1636, 29 L.Ed.2d 115 (1971). The trial court may, however, defer determination of the motion, Fed.R.Crim.P. 12(e), or grant relief from the waiver

A showing of fundamental error is necessary before we will consider issues not raised below. *United States v. Murray*, 492 F.2d 178 (9th Cir. 1973), cert. denied *sub nom., Roberts v. United States*, 419 U.S. 854, 95 S.Ct. 98, 42 L.Ed.2d 87 (1974). See Fed.R.Crim.P. 52(b).

No such error has been shown to exist. Appellant has not demonstrated that he was prejudiced by the challenged prosecutorial conduct. He has failed to show that his role as an informer actually exonerates him. As a consequence, his reliance on cases involving the use of perjured testimony relevant to a material element in an indictment is misplaced. See *United States v. Basurto*, 497 F.2d 781 (9th Cir. 1974). We can no more assume exculpation than we can materiality. Moreover, we recognize the wide discretion which the prosecution may exercise in grand jury proceedings. *United States v. Y. Hata & Co.*, 535 F.2d 508 (9th Cir. 1976).

Except for the convictions upon Count 22, which are in each instance reversed, and Stradley's conviction upon Count 27, all other convictions are affirmed.

Stradley was sentenced on Count 21 to two years, on Count 27 to five years, and on Count 28 to four years, all sentences to run concurrently. Stradley's conviction upon Count 27 is set aside upon the government's agreement, on a petition for rehearing, that it depended upon Count 22 and falls with the conviction upon Count 22.

Affirmed in part; reversed in part; remanded for entry of a modified sentence in No. 75-3428, *United States v. Walter Stradley*.

for good cause. Fed.R.Crim.P. 12(f). Cassidy failed to include this ground in his pretrial motion to dismiss the indictment; this failure alone is excusable because he did not receive a transcript of the relevant grand jury proceedings until midway through the trial. Nevertheless, he has no similar excuse for his failure to renew his motion during trial.

APPENDIX "B"

Rule 6. The Grand Jury.

(d) WHO MAY BE PRESENT. Attorneys for the government, the witness under examination, interpreters when needed and, for the purpose of taking the evidence, a stenographer or operator of a recording device may be present while the grand jury is in session, but no person other than the jurors may be present while the grand jury is deliberating or voting.

Rule 54. Application and Exception.

(e) APPLICATION OF TERMS. As used in these rules the following terms have the designated meanings.

"Attorney for the government" means the Attorney General, an authorized assistant of the Attorney General, a United States Attorney, an authorized assistant of a United States Attorney and when applicable to cases arising under the laws of Guam means the Attorney General of Guam or such other person or persons as may be authorized by the laws of Guam to act therein.

§ 515. Authority for legal proceedings; commission, oath, and salary for special attorneys

(a) The Attorney General or any other officer of the Department of Justice, or any attorney specially appointed by the Attorney General under law, may, when specifically directed by the Attorney General, conduct any kind of legal proceeding, civil or criminal, including grand jury proceedings and proceedings before committing magistrates, which United States attorneys are authorized by law to conduct, whether or not he is a resident of the district in which the proceeding is brought.

(b) Each attorney specially retained under authority of the Department of Justice shall be commissioned as special assistant to the Attorney General or special attorney, and shall take the oath required by law. Foreign counsel employed in special cases are not required to take the oath. The Attorney General shall fix the annual salary of a special assistant or special attorney at not more than \$12,000.

Added Pub.L. 89-554, § 4(c), Sept. 6, 1966, 80 Stat. 613.

APPENDIX "C"

APPENDIX C

June 11, 1974

Mr. Robert A. Breckstone
Criminal Division
Department of Justice
Washington, D. C.

Dear Mr. Breckstone:

The Department is informed that there have occurred and are occurring in the Northern District of California and other judicial districts of the United States violations of federal criminal statutes by persons whose identities are unknown to the Department at this time.

As an attorney of law you are specifically retained and compensated as a Special Attorney under the Act of April 26, 1950, as amended, to assist in the trial of the above-named persons in the Northern District and other judicial districts of the United States which may be so directed. In this connection, you will be compensated for your services in accordance with the fee schedule established by the Attorney General and the Special Master of the Office of the Trial Lawyer, or such other compensation as may be agreed upon between you and the Department prior to the commencement of your legal representation, and shall be kept informed of all developments.

Your assignment is limited to liability. In addition to the aforesaid cases, the whereabouts of the above-named persons in the aforesaid districts and other judicial districts of the United States.

You are to serve without compensation other than the compensation you are now receiving under contract with the Department.

If no case is presented to you, you will be paid \$100.00 per month until you are engaged in a case.

Very truly,

EDWARD E. DOLWIG
Assistant Attorney General

(NOTE: Please note that this is
a fair reproduction of what was
received by Appellant Dolwig.
Appellant has never been shown
a clear copy.)

BEST COPY AVAILABLE

APPENDIX "D"

OATH & OFFICE (Without Compensation)

ORIGINAL FILED

APPENDIX D

I, Robert J. Breakstone, do solemnly swear that I will support and defend the Constitution of the United States, against all enemies, foreign and domestic; that I will bear true faith and allegiance to the same; that I take this obligation freely, without any mental reservation or purpose of evasion; and that I will well and faithfully discharge the duties of the office of Special Attorney on which I am about to enter in the Northern District of California, pursuant to the authorization of Henry E. Petersen, Assistant Attorney General, Criminal Division, Department of Justice,

dated June 11, 1974 and filed herewith: So help me God.

(Sign Here) Robert J. Breakstone

Date of Birth Nov. 27, 1939

Date of Entry Upon Duty March 18, 1974

Subscribed and sworn to before me this 17

day of June, A.D. 1974,

at San Francisco, Calif.
(City and State)

(Seal)


(Signature of Officer)

DEPUTY ATTORNEY GENERAL

NORTHERN DISTRICT OF CALIFORNIA

(Title)

Note 1—If certificate is executed by a Notary Public, date of expiration of commission should be shown.

Note 2—An executed copy of this form should be returned to the appropriate division.

APPENDIX "E"

APPENDIX E

Department of Justice
Washington 20530

February 4, 1975

Mr. Edmund D. Lyons
Criminal Division
Department of Justice
Washington, D. C.

Dear Mr. Lyons:

The Department is informed that there have occurred and are occurring in the Northern District of California and other judicial districts of the United States violations of federal criminal statutes by persons whose identities are unknown to the Department at this time.

As an attorney at law you are specially retained and appointed as a Special Attorney under the authority of the Department of Justice to assist in the trial of the aforesaid cases in the aforesaid district and other judicial districts of the United States in which the Government is interested. In that connection you are specially authorized and directed to file informations and to conduct in the aforesaid district and other judicial districts of the United States any kind of legal proceedings, civil or criminal, including grand jury proceedings and proceedings before committing magistrates, which United States Attorneys are authorized to conduct.

Your appointment is extended to include, in addition to the aforesaid cases, the prosecution of any other such special cases arising in the aforesaid districts and other judicial districts of the United States.

You are to serve without compensation other than the compensation you are now receiving under existing appointment.

Please execute the required oath of office and forward a duplicate thereof to the Criminal Division.

Sincerely,


JOHN C. KEENEY
Acting Assistant Attorney General

BEST COPY AVAILABLE

APPENDIX F

OATH : OFFICE (Without Compensation)

APPENDIX F

I, Edmund D. Lyons, do solemnly swear that I will support and defend the Constitution of the United States against all enemies, foreign and domestic; that I will bear true faith and allegiance to the same; that I take this obligation freely, without any mental reservation or purpose of evasion; and that I will well and faithfully discharge the duties of the office of Special Attorney on which I am about to enter in the Northern District of California, pursuant to the authorization of Acting Assistant Attorney General John C. Keane, Criminal Division, Department of Justice, Washington, D. C.
dated February 4, 1975 and filed herewith: So help me God.

(Sign Here) Edmund D. Lyons

Date of Birth 9/20/47
Date of Entry Upon Duty 2/17/75

ORIGINAL
FILED

FEB 19 1975

Subscribed and sworn to before me this 19
day of February, A.D. 1975.
at San Francisco, California.
(City and State)

CLERK, U. S. DIST. COURT
SAN FRANCISCO

Walter M. Mays
DEPUTY CLERK (Signature of Office)
NORTHERN DISTRICT OF CALIFORNIA

(Title)



Note 1—If certificate is executed by a Notary Public, date of expiration of commission should be shown.

Note 2—An executed copy of this form should be returned to the appropriate division.